No. 15999

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEATRICE NELSON

Appellant,

vs.

NEW HAMPSHIRE FIRE INSURANCE COMPANY, a Corporation,

Appellee.

Reply Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

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ARGUMENT

The preliminary objection to review which is contained in the Brief of Appellee we submit to be inappropriate and without foundation in law. There is no rule, to our knowledge, requiring a party after the Court makes findings and renders unfavorable judgment to file proposed findings of fact or proposed conclusions of law, or proposed judgment. This would be inconsistent with the simplicity sought in Federal rules. The authorities cited by appellee are inappropriate for the contention sought in the preliminary objection.

In the seriatim reply by appellee to specifications of error, attention is called to the case cited by appellee on page 3 of its brief.

> Occidental Life Ins. Co. vs. Thomas, 107 Fed. (2) 876.

This case reiterates the oft repeated rule that the trial court's findings are not to be disturbed on appeal unless clearly erroneous. The Brief of Appellant filed herein is replete in showing that the findings of the trial court were clearly erroneous and based on a misapprehension of Idaho Law.

Appellee, on page 4 and following in its brief notes the statement that one who purchases property must at his peril ascertain the title and right of vendor to sell. Idaho has indeed gone much further than other states in imposing a "conversion."

> Klam vs. Koppel, 63 Ida. 171, 118 Pac. (2) 729.

In addition to the cases and authorities cited by appellee, the Idaho Court went further in Ringele vs. Terteling, 78 Ida. 431, 305 P2d 431, in which a party was liable in conversion although ignorant of the title rights at the time the property was taken. The question then simply is this: Is not an insured entitled to protection under an insurance contract when such insured might have acquired property for which insured is responsible to the true owner for its value, especially when destruction of the property would most cer-

tainly bring about conversion under Idaho law? It is exactly because of the existence of liability in conversion (which in effect is a forced sale on an innocent purchaser) that the insurance contract should be looked to for protection by purchasers of property in Idaho. When, therefore, property is destroyed by fire, the purchaser for value will not be left without protection when he is called on to answer to a true owner.

In an extension of this same point, might we call the attention of this Court to the language on page 10 of the brief of appellee. First, the bland statement that the interest of a purchaser is not insurable is not supported in any way by the authorities cited. Mountain States Impl. Co. vs. Arave, 50 Ida. 557, 207 Pac. (2) 314, cited therein by appellee, concerns itself with an order of a court and judgment and does not discuss at all insurable interest. Similarly with Dumas vs. Bryan, 35 Ida. 557, 207 Pac. 720. But one's attention is caught by the language in the Dumas case:

> "It is held by all of the authorities that an unconstitional law is in logical effect no more than a blank page, and therefore the question of its validity or of any rights sought to be exercised under it, is never waived but may always be raised at any stage of the proceeding . . ."

Not ony the Federal Constitution, but the Idaho Constitution, expressly adopts the theory of sacredness of contractual obligation.

"No . . . law impairing the obligation of contracts shall ever be passed."

Art. I, Sec. 16, Constitution of the State of Idaho.

That great jurist, Judge Budge, when sitting on our high court in Idaho, had several occasions to pass on this section.

"The obligation of a contract is impaired by a statute which alters its terms, by imposing new conditions or dispensing with conditions . . . or lessens any part of the contract obligation or substantially defeats its ends."

Fidelity State Bank vs. North Fork H. Dist., 35 Ida. 797, 813, 209 Pac. 444.

"Any enactment of a legislative character is said to 'impair the obligation of a contract which attempts to take from a party a right to which he is entitled by its terms, or which deprives him of the means of enforcing such a right.' (12 C. J. p. 1056, Sec. 699)."

Sanderson vs. Salmon River Canal Co., Ltd. 45 Ida. 244, 257, 263 Pac. 32.

See Steward vs. Nelson, 54 Ida. 437, 32 P. (2) 843.

We submit if the statute defining insurable interest in-

terferes in the obligation of appellee to pay it is under Idaho law unconstitutional.

Commencing in the middle of page 5 and continuing on into brief of appellee, a distinction is made on the doctrine of apparent authority and also on sales transaction being void or voidable. To properly analyze the cases, one must distinguish between the rights of a seller or vendor failing to deliver a title certificate as distinguished from the rights of a purchaser for value failing to receive a title certificate. The two must be clearly distinguished or the perspective in the case is missed. Once the distinction is borne in mind, the position of appellee is seen to fall.

Authority of the agent to sale, whether implied or apparent, or derived from an estoppel, cannot be denied, when an agent is given possession of property and indicia of ownership. Reading the authorities indicate this. Estoppel in pais must be considered. As was recently stated in a well known legal publication:

> "So here, at least, all the splits of authority are fusses over nothing, because the result is the same, or, at least, should be the same."
>
> American Bar Association Journal, Vol. 44, No. 9, p. 850.

The appellee on Page 4 of its brief fails to quote the entire section leaving out the apparent authority and other exceptions. Sec. 64-207, Idaho Code, reads:

"Transfer of title—Sale by a person not the owner—

1. Subject to the provisions of this law, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

2. Nothing in this law, however, shall affect:

a. The provisions of any factors' acts, recording acts, or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.

b. The validity of any contract to sell or sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction."

As to the statement that the only basis that Roberts and Pauls had authority to sell was their own statement to that effect, we submit in addition that the most important criterion, "possession," was present in Roberts, which included not only actual possession of the property itself, but also the papers which attended the transaction. Further, the record shows, without doubt, that under certain conditions Roberts had actual authority to sell (R. 117 R. 76).

As to Point 5 on Page 6, not only did Roberts have

authority to sell, but we submit that under the trite and well-known law appellant under any contention acquired an interest in the trailer house which was good as against the whole world except the true owner.

Of course, the statement on page 7 is not in order as Roberts had indicia of ownership.

On page 13 we find this statement:

> "We are forced back to the initial premises that one who has no more right or title than a thief cannot pass any more right or title than a thief, and his attempt to do so produces no insurable interest."

Again the smoke screen is raised, and, contrary to the implication of appellee, except for a small number of minority states, we know of no cases where a purchaser for value cannot protect himself against certain risks, such as fire, by insuring the property of which he has possession.

We further submit that the appellee misreads Dissault vs. Evans, 74 Ida. 295, 261 P. (2) 822. On page 21, appellee states it is futile to find the solution to the Idaho statutory problem in the decisions in other states. We submit, that Idaho has spoken clearly and that until the factual situation such as is now before this court has been considered by the Idaho Supreme Court, the liberality favoring the insured and binding the insurer to its contract should be the lamp post which lights the way for a decision of the instant cause. Such light, without doubt, under the Idaho law,

shows appellant is entitled to recovery.

We submit, the evidence without doubt, discloses Beatrice Nelson to be a purchaser for value. Further, although as stated by appellee on page 26 of its brief, the trial court concluded that in the state of Idaho a certificate of title is a condition precedent to acquiring an interest in a trailer home, we submit such is not the law in the State of Idaho and in Idaho insurable interest has never been held lacking because of title deficiency.

One is intrigued indeed by the statements and arguments contained on page 8 of the brief of appellee. Certainly, the appellant stated all circumstances affecting the risk—we emphasize "affecting the risk." This brings up the constant feature of this lawsuit, that title has nothing to do with risk. A purchaser for value has always been held to have an insurable interest covering property which was purchased.

One is impressed throughout the record with the collateral attack made by the insurance company as to title when no direct attack was or has been made by the alleged true owner. We discussed this title question in our original brief. In Idaho, under the equities of the matter, appellant became the actual owner. This leaves the question before this Court: Can a collateral defense be raised by an insurer as to the title in property when the insured has a title which has either withstood attack from outside title claimant or produced no attack by an outside title claimant?

Appellee pays special detail to the insurable interest ques-

tion. We feel that further statements beyond our original brief would be redundant. The insured, appellant here, certainly was not an embezzeler. Appellee again, as in the trial court, forces before this court a smoke screen as if this were a suit by adverse title claimants. This is a claim by appellant on a contract. The contract was one for insurance, and appellant asks nothing more, having fulfilled the contract on her part by payment of the premium, that the insurer, appellee here, perform its part of the contract by payment after loss.

Otherwise, as suggested in our earlier brief, an unearned windfall gain and unjust enrichment goes to appellee, while appellant suffers an unnecessary and tragic windfall loss.

Respectfully submitted,

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